No. 89-438

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

GREG'S HESS STATION, INC.,
A New Jersey Corporation,

Petitioner,

vs.

STATE OF NEW JERSEY, by the
COMMISSIONER OF TRANSPORTATION,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the dismissal by the state court of petitioner's counterclaim for direct and separate compensation for the termination of its gasoline business franchise contract as a consequence of the respondent's condemnation of the real property on which the gasoline business was conducted, which dismissal was unanimously affirmed by the intermediate appellate court and denied review by the New Jersey Supreme Court.

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The order of the New Jersey Superior Court, Law Division, which dismissed petitioner's counterclaim, was entered on October 13, 1986. The opinion below of the New Jersey Superior Court, Appellate Division, which unanimously affirmed the dismissal of petitioner's counterclaim, is reported as *State v. Hess Realty Corp.*, 543 *A.*2d 1050, 226 *N.J. Super.* 256 (App. Div. 1988). The denial of the petition for certification by the New Jersey Supreme Court by order entered on October 25, 1988 is reported at 550 *A.*2d 484, 113 N.J. 383 (1988).

It is noted that there was a dissent, in part, in the Appellate Division with regard to an issue not before this Court regarding the majority's dismissal of petitioner's crossclaim against Hess Realty Corporation and third party complaint against Amerada Hess Corporation, in which petitioner sought a fair share of the condemnation proceeds. This issue was considered by direct appeal by the New Jersey Supreme Court, which affirmed the dismissal of the petitioner's crossclaim and third party complaint, and which is reported as *State by Com'r of Transp. v. Hess Realty,* ___ *A.*2d ___, 115 *N.J.* 229 (1989).

STATEMENT OF THE CASE

This is a condemnation action in which the State of New Jersey, by the Commissioner of Transportation, acquired the entire property in fee simple of the owner, Hess Realty Corporation, for highway purposes. The property was improved as a gasoline service station, which sold "Hess" brand gasoline and other petroleum

products. The State's complaint included as one of the defendants, petitioner Greg's Hess Station, Inc., for any interest which it might have in the property by reason of being a tenant, occupant or lessee of the premises. Under the New Jersey and federal Constitutions, petitioner sought, by its counterclaim, direct and separate compensation for the loss of its franchise business. The state court below dismissed the counterclaim.

By written "dealer agreement" dated August 25, 1981, third party defendant Amerada Hess Corporation, lessee of defendant owner, Hess Realty Corporation, leased the improved gas station premises and gave a license or franchise to operate a "Hess" brand gasoline business to dealer Gregory Forte, principal and sole shareholder of petitioner, for a term of one year from December 1, 1981 to November 30, 1982, upon payment of specified monthly rent. The agreement was automatically renewable for successive yearly periods until terminated.

The agreement, which described itself as a "personal services contract," allowed the dealer to use the property for the operation of a "Hess" brand gasoline station. It also acknowledged the valuable good will of the Hess trademarks, tradenames and color schemes. Paragraph 17 of the agreement listed several grounds by which Amerada Hess could terminate the agreement. It included the following:

> If the Station or any part thereof is taken or condemned for a public or quasi-public use, *this Agreement shall, at the option of Hess, terminate as of the date title shall vest in the condemnor and dealer shall have no claim or interest in or to any*

> *award of damages for such taking*, including but not limited to any claim for the value of any unexpired portion of the term of this Agreement, and assigns to [Amerada] Hess all claims and rights in connection with any such taking or condemnation, and agrees to execute any documents in connection therewith or in confirmation thereof. [Emphasis added].

The dealer agreement, which had been automatically renewed since 1982, was terminated by Amerada Hess pursuant to the condemnation clause in the dealer agreement.

The State's estimate of just compensation for the taking of the entire property as improved is based on its highest and best use as a gasoline service station in the "generic" sense, and includes the value, if any, of petitioner's leasehold interest or right to occupy the premises. However, it includes neither the separate value of petitioner's permit or license to use the Hess tradename, trademarks and color scheme as set forth in the dealer agreement nor the separate loss or termination of this franchise or its franchise relationship with Amerada Hess.

In response to the complaint, petitioner filed an answer and counterclaim that it had a franchise right, protected by state and federal statutes, to operate the Hess station on the property; that, but for the condemnation, its franchise rights would have continued indefinitely: and that its franchise, although not transferable to any other location, is valuable property "separate and apart from the land and premises." Petitioner sought to have the State institute a separate condemnation action to determine just compensation for the termination of its

franchise based on state and federal constitutional guarantees.

The state trial court summarily granted the State's motion to dismiss the counterclaim on the ground that the franchise contract is not property compensable in condemnation. On appeal, the Appellate Division unanimously affirmed the dismissal of the counterclaim. In its reported opinion, the Appellate Division restated well established condemnation principles that:

> The condemnee is not entitled to any independent compensation for the value of the business located on the condemned property unless the government plans to continue operation of a business it acquires by condemnation. *City of Trenton v. Lenzner*, 16 *N.J.* 465, 476-477 (1954), *cert.* den. 348 *U.S.* 972, 75 *S.Ct.* 534, 99 *L.Ed.2d* 757 (1955). There is no basis for either a separate award for either a tenant or franchisee, *State v. New Jersey Zinc Co., supra* [193 *A.*2d 244, 251, 40 N.J. 560, 574 (1963)] and neither the loss of the business nor a loss of a franchise is a separate compensable item. *State v. Gallant*, 42 *N.J.* 583, 587 (1964). [543 *A.*2d at 1052-1053, 226 *N.J. Super.* at 262].

The appellate court also relied on *Jersey City Redevelopment v. Exxon Corp.*, 504 *A.*2d 1207, 208 *N.J. Super.* 53 (App. Div. 1986), which held that the definition of "property" in the Eminent Domain Act of 1971, N.J. Stat. Ann. 20:3-1 *et seq.*, does not include franchise contract rights, even when so closely tied to the real estate as in the case of a gas station. Moreover, a majority of the appellate court found that petitioner was bound by the express provision of the dealer agreement in which it waived any right to compensation in the event of condemnation.

The New Jersey Supreme Court subsequently denied the petition for certification regarding the dismissal of the counterclaim.

REASONS FOR DENYING THE WRIT

The writ sought here should be denied because the state courts below correctly determined that petitioner is not constitutionally entitled to direct and separate compensation for the termination of its gasoline business franchise as a consequence of the taking of the real property on which the business was conducted. This determination is consistent with the provisions of the dealer agreement itself, the federal gasoline franchise statute, and the just compensation requirement of the Constitution as construed by this Court. This petition does not present special and important reasons which warrant the exercise of this Court's discretion in reviewing this matter.

A. Petitioner's Writ Should Not Be Granted As Its Claim Was Properly Dismissed Because It Expressly Waived Any Entitlement to Just Compensation.

In the dealer agreement, petitioner expressly waived any claim or interest in any award of just compensation in the event of condemnation. Relying on *Jersey City Redevelopment v. Exxon Corp., supra,* the majority of the state Appellate Division found that waiver clauses are common, normally enforceable, consistent with applicable state and federal gasoline franchise legislation, and parties must be bound by their agreements. Petitioner here is bound by the terms of the dealer agreement which

created its lease and business interests. Such interests cannot exceed or be greater than the conditions and limitations of the dealer agreement which create them. In *United States v. Petty Motor Co.*, 327 U.S. 818 (1946), this Court stated:

> The [tenant] had contracted away any rights that it might otherwise have had. We are dealing with a clause for automatic termination of the lease in a taking of property for public use by governmental authority. With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing. [327 U.S. at 376].

The termination of the dealer agreement and the waiver of any compensation, in the event of condemnation, and the absence of any assurance of being able to transfer its business elsewhere, were business risks which petitioner assumed; and it had no basis for any "reasonable investment-backed expectation" to the contrary. *Ruckelshaus v. Monsanto Co.*, 467 *U.S.* 986, 1005 (1984). Accordingly, petitioner's counterclaim was properly dismissed.

B. Even If Petitioner Had Not Expressly Waived Any Entitlement to Just Compensation, Its Constitutional Claim Lacks Merit.

What constitutes property for constitutional purposes is decided by reference to state law. *United States ex rel. T.V.A. V. Powelson*, 319 *U.S.* 266, 279 (1942). It is a question governed by the law of the state in which the property is located. *United States v. Certain Land in the City of Newark*, 314 *F. Supp.* 836, 838 (D.N.J. 1970), aff'd 439 *F.*2d 670 (3d Cir. 1971); *Montville Twp. v. Block, 69, Lot 10*, 376 *A.*2d 909, 912, 74 *N.J.* 1, 7 (1977). Existing rules or

understandings that stem from an independent source such as state law, rather than the Constitution, create and define the dimensions of property interests. *Board of Regents v. Roth*, 408 *U.S.* 155, 162 (1980). *Ruckelshaus v. Monsanto Co., supra*, at 1001.

This condemnation action was commenced pursuant to the authority of the state Commissioner of Transportation to acquire real property for highway purposes in accord with the eminent domain statute. *N.J. Stat. Ann.* 27:7-2 *et seq.* and 27:7A-1 *et seq.* The Eminent Domain Act of 1971, *N.J. Stat. Ann.* 20:3-1 *et seq.*, defines "property" as follows:

> "Property" means land, or any interest in land, and (1) any building, structure, or other improvement imbedded or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed or specially adapted to the purpose for which such property is used that (a) it is an essential accessory or part of such property; (b) it is not capable of use elsewhere; and (c) would lose substantially all its value if removed from such property. [*N.J. Stat. Ann.* 20:3-2(d)].

This statutory provision is essentially the legislative codification of the judicial "functional unit rule," which provides that, when personalty constitutes a functional unit with the building, the former becomes compensable upon the taking of the latter, if the difference between the value of the building, with and without such personalty, is substantial. *State v. Gallant*, 202 *A.*2d 401, 42 N.J. 583

(1964); *Town of Montclair v. D'Andrea, et al.*, 351 *A.*2d 397, 138 *N.J. Super.* 478 (App. Div. 1976).

Petitioner's right to occupy the subject property, or its leasehold interest, is admittedly a property interest and was the reason why it was named as a party to this condemnation action. But for the express waiver in the dealer agreement, petitioner would have been entitled to compensation to the extent that the leasehold's market value exceeded the rent reserved, for the unexpired term. *United States v. Petty Motor Co., supra.* However, as determined by the state court below, petitioner's franchise to use the "Hess" name and to trade on its reputation and goodwill does not constitute "property" compensable in the condemnation of the real property on which the gasoline business was conducted.

The provisions of the federal Petroleum Marketing Practices Act, 15 *U.S.C.* § 2801 *et seq.*, which preempt state statutes concerning the termination of franchises and nonrenewal of franchise relationships, support this conclusion. Under the Act, a franchisor may terminate the franchise or fail to renew the franchise relationship based upon one of several specified grounds if the required notice provisions of the Act are met. A specified ground for termination or non-renewal is "condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain." 15 *U.S.C.* § 2802(c)(5). In such event, the Act provides:

> . . . the franchisor shall fairly apportion between the franchisor and the franchisee compensation, *if any*, received by the franchisor based upon any loss of business opportunity or good will. 15 *U.S.C.* § 2802(d)(1). [Emphasis added].

As can be seen, the Act characterizes the effect of condemnation on a franchise in terms of loss of business opportunity or good will and not in terms of a direct compensable property interest. Indeed, if Congress had intended the gasoline franchise to constitute a separate compensable property interest in the event of condemnation, the above quoted statutory provision would be meaningless.

Here, the business franchise aspect of petitioner's dealer agreement is a personal services contract establishing a business relationship between it and Amerada Hess. In its counterclaim, petitioner characterizes it as "separate and apart from the land and premises." Even assuming that it had measurable value as asserted, the dealer agreement acknowledges its value comes from the trademarks of Amerada Hess which have acquired and have attached to them valuable good will in the minds of the public. In other words, any value derives from the good will, product quality and reputation, marketing policy and solicitation efforts of Amerada Hess, none of which is related to the specific real property acquired by the State in this condemnation action. Consistent with the language of the Act and the state statutory definition of "property," the state courts below properly concluded such interest was not compensable"property" within the scope of the within condemnation action.

Well established condemnation valuation principles adopted by this Court provide that any business loss of petitioner is a noncompensable consequence of the taking of the real property. The Constitution does not require payment for the loss or destruction of business when the real property on which the business is conducted is

acquired by condemnation. *Mitchell v. United States*, 267 *U.S.* 341 (1925); *Bothwell v. United States*, 254 *U.S.* 231 (1920). This is so even if the business cannot be re-established elsewhere. *Mitchell v. United States, supra.* Not all losses suffered by an owner are compensable under the Fifth Amendment; and a condemnor is not required to pay for that which it frustrates or for opportunities a condemnee loses, but only for that which it takes. *United States ex rel. T.V.A. v. Powelson, supra.* Thus, compensation does not include the value of good will or injury to the business in the condemnation of real property. *United States v. General Motors Corp.*, 323 *U.S.* 373, 383 (1944). While consideration may be given to special value which the land may have due to its adaptability or suitability for use in a particular business in determining just compensation, the loss or destruction of a business is not an item of separate or independent compensation. *Mitchell v. United States, supra; City of Trenton v. Lenzner*, 109 *A.*2d 409, 414-415, 16 *N.J.* 465, 476-79 (1954), *cert.* den. 348 *U.S.* 972 (1955).

Moreover, even that which may be "property" in the constitutional sense is not compensable unless directly appropriated or taken. Unless the government directly acquires the obligation or right to enforce a contract, as distinct from the subject matter of the contract, the government has not "taken" the contract but rather has merely ended it by rendering it impossible to perform. If the contract is kept alive for the use by the government, there would be a constitutional obligation to compensate for its taking. *Omnia Commercial Co. v. United States*, 261 *U.S.* 502 (1923). In this matter, the State has not taken petitioner's franchise business interest; rather it was

ended as contemplated by the terms of the dealer agreement itself.

Petitioner nevertheless cites three decisions of this Court in support of its claim for just compensation for the loss of its franchise business. In *Monongahela Navigation Co. v. United States*, 148 *U.S.* 312 (1893), this Court construed just compensation to require consideration not only of the cost of the navigation company's lock and dam but the income which those improvements generated pursuant to the company's chartered right to collect tolls. Against a background of estoppel principles arising from the fact that the company had built the lock and dam at the invitation of the United States and under a state charter, the Court determined that the company's right to collect tolls went with, and was a substantial element in the value or productiveness of, the lock and dam taken. It was noted by the Court that, after the taking, the government would have the right to exact the same tolls the navigation company had been receiving. *Kimball Laundry Co. v. United States*, 338 *U.S.* 1 (1949), involved a laundry owner's claim for just compensation for the loss of its "trade routes" or customer lists and patronage as a result of the temporary taking of its laundry plant. Adopting the rationale of a narrow line of cases where government condemns business property for the purpose of continuing the operation of the business, the Court required that just compensation for a temporary taking include the transferable going concern value of the business for the period of the temporary taking. The *Kimball* Court expressly limited its ruling to the unique and extraordinary circumstance of a temporary taking where government acquires a business to continue the

operation of such business. *Almota Farmers Elevator & Whse Co. v. United States*, 409 *U.S.* 470 (1973), involved the narrow issue of the effect of the expectancy of the renewal of the lease on the fair market value of the substantial physical leasehold improvements taken. Essentially the *Almota* Court allowed the expectation factor to be considered in the determination of fair market value of the leasehold improvements. Contrary to petitioner's argument, these three cases do not support its broad demand for direct and separate compensation for the loss of its franchise to market Hess brand gasoline and petroleum products.

The State's estimate of just compensation does consider the rental income which the real property taken, having a highest and best use as a gasoline station, could generate. This is consistent with *Monongahela*. Critically it is the income which the real property itself generates, as opposed to income generated from the operation of a specific brand gasoline business on the property, which is an appropriate element of just compensation. See *United States ex rel. T.V.A. v. Powelson, supra*. This is so because the income from the gasoline business is dependent on various factors which are unrelated to the value of the land and improvements taken. These include product quality, reputation, price, hours of operation, entrepreneurial skill, advertising and marketing policy. The franchise right to sell a particular petroleum product generates business income and is not income indicative of the productiveness of the land and improvements taken. Petitioner's franchise is a business interest, separate and apart from the land, and not probative of the fair rental value which the real property might realize. Whether

petitioner operated a gas station business with or without its Hess franchise, the fair market value of the land and improvements would be the same. For these reasons, the franchise is not included in the determination of just compensation for the real property taken.

Further, contrary to the circumstances in *Kimball* and the circumstances noted in *Monongahela*, the State's taking was not for the purpose of continuing the operation of the Hess station. The State has not totally acquired or controlled or deprived the owner of the going concern value of the franchise business on the subject property. Any transferable value of the intangible managerial skill and solicitation for patronage, which *Kimball* identified as the components of "going concern value," has not been taken by the State. Rather, the Hess marketing policy, tradename, trademarks, color scheme, advertising efforts, good will, product quality and reputation, all of which factors contribute to any value of petitioner's franchise contract, remain within the total control of Amerada Hess Corporation. Had this been a fee taking of a gasoline station owned and operated directly by Amerada Hess, without an intermediary franchisee such as petitioner, the measure of just compensation would not have included any aspect of the going concern value, as Amerada Hess fully retains it. Accordingly, the presence of the tenant franchisee circumstance cannot create any greater obligation of just compensation. *United States v. Petty Motor Co., supra.*

Finally, in *Kimball*, the Court cited approvingly *Bothwell v. United States, supra,* and confirmed its settled rule that the Fifth Amendment does not require compensation

for intangible business value when the fee title to business property is taken. This is so since only the physical property, and not the going concern value, has been taken; and the owner is free to move his business to a new location. The *Kimball* Court also cited approvingly *Mitchell v. United States, supra,* for the rule that, even assuming no other premises whatsoever were available, there is no compensation for business loss when the fee is taken. Similarly the *Almota* Court expressly noted that the tenant therein was not seeking compensation for business losses or for lost business opportunities, which the Court confirmed would be unavailable under *Mitchell, supra, Powelson, supra,* and *Omnia Commercial Co., supra* had the taking been a fee taking of all the interests in the property.

Any business or franchise loss which petitioner has incurred as a consequence of the fee taking of the real property was properly determined to be noncompensable by the state court below. Consistent with *Omnia Commercial Co., supra,* the State has not appropriated or taken any right or obligation of petitioner's franchise contract but has merely rendered such contract impossible to perform. The termination of the franchise pursuant to the express terms of the dealer agreement which created the franchise interest is not a taking.

In light of all of the circumstances, the principles of substantial justice, fair dealing, and indemnity which underlie the federal constitutional just compensation clause, *United States v. Miller,* 317 *U.S.* 369 (1942), have not been undermined by the dismissal of petitioner's counterclaim below. On the contrary, it would be patently unjust and unfair to impose upon the State the obligation to pay for that which is not "property" compensable for purposes of this state eminent domain action, but which

instead is more in the nature of business opportunity lost. Moreover, even if the franchise were "property" in the Constitutional sense, it has not been "taken", but merely ended as a consequence of the taking of the real property. Without a taking, there is no obligation to pay compensation. Any misgivings about the result reached below are soundly put to rest upon a thorough understanding of the constitutional "just compensation" clause and the nature and limitations of the franchise created by the dealer agreement. Petitioner's writ presents a claim which is contrary to well established condemnation valuation principles adopted by this Court. Petitioner here seeks that which the Constitution does not require and which is a matter for legislative, not judicial, discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of *Certiorari* in this case should be denied.

Respectfully submitted,

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